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IN THE COURT OF APPEALS OF INDIANA

NATHAN E. McKINNEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0605-CR-208
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Judge
Cause No. 02D04-0509-FA-55

February 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Nathan E. McKinney appeals from the ten-year sentence imposed by the trial court following his guilty plea to Burglary,[1] a class B felony. Specifically, McKinney argues that his sentence is inappropriate in light of the nature of the offense and his character. Finding that the advisory sentence imposed by the trial court was not inappropriate in light of the offense and McKinney's character, we affirm the judgment of the trial court.

FACTS

On September 15, 2005, McKinney broke into the house of Christopher and Susan Hamm and, when in the house, intended to commit a felony, specifically theft or robbery. Thereafter, the State charged McKinney with class A felony burglary[2] and class B felony robbery.

On February 17, 2006, McKinney pleaded guilty to an amended count of class B felony burglary in exchange for the reduction of the burglary charge and the dismissal of the robbery charge. The plea agreement provided that sentencing would be open to the trial court's discretion.

In March 2006, the trial court held a sentencing hearing. During the sentencing hearing, McKinney acknowledged that he had a prior conviction for criminal conversion that could be viewed as an aggravating circumstance. The prosecutor described the facts surrounding McKinney's crime and indicated that:

[T]hese two individuals [McKinney and his accomplice, Kevin Clopton]

[1] Ind. Code § 35-43-2-1.

[2] The burglary was charged as class A felony based upon the allegation that McKinney's commission of the burglary resulted in bodily injury to the victims. See I.C. § 35-43-2-1(2)(A).

> kicked in the door of Chris and Susan Hamm as they were sitting on their couch watching television in their home. They came in with guns drawn, demanding powder and demanding money. It became evident through the course of the investigation that the two simply . . . they had something in mind, they were there looking to, I don't know whether it was to exact revenge from some drug dealer or what may have been, but the[y] repeatedly demanded the powder and the money from these folks. At some point, it was Mr. McKinney that took Mrs. Hamm into the bedroom for her to find what ever [sic] money she could scrape together to get these people out of her house. And once she gave them the money out of her husband's billfold, he put the gun to her head and demanded still the powder and the money again. It was Mr. McKinney that did that, not Mr. Clopton. Put a gun to her head and demanded everything that they had in that house . . . and I would just as[k] that the court consider those events as part of it's [sic] sentence here.

Sent. Tr. p. 8-9. Before sentencing McKinney, the trial court stated:

> . . . I recall reading the probable cause and thinking at the time that we're very fortunate here that more damage was not done. This is the kind of fact situation that not uncommonly leads to significant injury or death. And I simply can't count on this kind of conduct . . . and I've heard and paid attention to his impassioned plea here today . . . Criminal record is neither [here] nor there, it is certainly not a mitigator but it's not an aggravator. He graduated from high school. On the other hand, he's had . . . looks like two one year periods of employment that are separated by a year. He's sure not out there busting his butt to be making a living. Looks like he's had a little contact with substances but again not severe. But this conduct I find to take center stage here and I want the record to be very clear that I am, it is not my intent here to consider at sentencing the previous charges, the fact that this was broken down from a[n] A to a B, but never the less [sic], I don't think I'm required to ignore the underlying facts. <u>The fact that this home was forcibly broken into at a time when the owners were there and that weapons were used very actively in threatening these folks. I don't think I'm required to ignore that in spite of the fact that it's charged as a B felony, that he's pled as a B felony.</u> The facts are the facts.

<u>Id.</u> at 11-13 (emphasis added). The trial court then sentenced McKinney to the advisory term

of ten years for his class B felony conviction.[3] McKinney now appeals.

DISCUSSION AND DECISION

I. Amended Sentencing Statutes

McKinney argues that his sentence imposed by the trial court for his burglary conviction is inappropriate in light of the nature of the offenses and his character. Before addressing the merits of McKinney's argument, we observe that on April 25, 2005, the General Assembly amended Indiana's felony sentencing statutes, which now provide that the person convicted is to be sentenced to a term within a range of years, with an "advisory sentence" somewhere between the minimum and maximum terms. See Ind. Code §§ 35-50-2-3 to -7. As it calculates the sentence to impose on a defendant, the trial court "may consider" certain enumerated aggravating and mitigating circumstances in addition to other matters not listed in the statute. I.C. §§ 35-38-1-7.1(a) to -7.1(c). Furthermore, the legislature provided that a trial court "may impose any sentence that is . . . authorized by statute . . . regardless of the presence or absence of aggravating circumstances or mitigating circumstances." I.C. § 35-38-1-7.1(d) (emphasis added).

Here, the commission of McKinney's crime and his sentencing occurred after the April 2005 amendment of the sentencing statutes; thus, we will apply the amended sentencing statutes. In examining the amended sentencing statutes, we conclude that if a trial court chooses to impose a sentence greater than the advisory term, it is not required to make findings as to the existence of mitigating or aggravating factors. See id. If it does identify

[3] Indiana Code section 35-50-2-5 provides, in part, that "[a] person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten

aggravators and/or mitigators, however, the trial court must simply state its reasons on the record for choosing the particular sentence that departs from the advisory term. I.C. § 35-38-1-3(3).

Moreover, under the amended sentencing scheme, a defendant may no longer claim that a trial court abused its discretion under statutory guidelines in imposing the sentence. Because we can no longer reverse a sentence because a trial court improperly found and/or weighed aggravating and mitigating circumstances, our review is now confined to an analysis under Indiana Appellate Rule 7(B): "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." We also observe, however, that we are entitled to consider, among other things, aggravating and mitigating factors found—or not found—by the trial court as we conduct a Rule 7(B) review. See, e.g., Prowell v. State, 787 N.E.2d 997, 1005 (Ind. Ct. App. 2003) (considering statutory aggravators and mitigators as part of an analysis of the character of the offender); Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003) (same).

II. McKinney's Sentence

McKinney argues that the sentence imposed by the trial court for his offense is inappropriate in light of the nature of the offense and his character. In particular, he contends that the trial court considered an improper aggravator and failed to consider two mitigators. However, under the new statutory scheme, a trial court will not be found to have abused its

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(10) years."

discretion in considering and weighing aggravators and mitigators because it is free to impose any sentence authorized by statute. We may consider any aggravators and mitigators found by the trial court, however, along with any other evidence apparent from the record, in determining whether McKinney's sentence comported with Appellate Rule 7(B).

Turning first to the nature of the offense, the probable cause affidavit included in the record indicates that around 10:50 p.m., McKinney, armed with an automatic handgun, and his accomplice went to Christopher and Susan Hamm's house, where they "forced entry into the home" and forced the deadbolt lock through the door frame as the Hamms were inside the house. Appellant's App. p. 12. McKinney shoved Susan to the floor, pointed his gun at the victims "during the whole incident[,]" demanded money from the victims, and took $124.00 in cash, a two-way radio, and a cordless telephone. Id.

McKinney argues that the trial court erred in sentencing him because it improperly used the element distinguishing the greater class A felony burglary offense to which he was charged from the included class B felony burglary offense to which he pleaded guilty, in contravention of Conwell v. State, 542 N.E.2d 1024, 1025 (Ind. Ct. App. 1989). In Conwell, we held that "when a defendant pleads guilty to an included offense, the element(s) distinguishing it from the greater offense . . . may not be used as an aggravating circumstance to enhance the sentence." Conwell, 542 N.E.2d at 1025. Here, McKinney was charged with burglary as a class A felony based upon the bodily injury suffered by the victims. Appellant's App. p. 9. The trial court, when reviewing the facts of McKinney's offense, did not mention any injuries suffered by the victims and, instead, focused on the fact that McKinney broke into the victims' house while they were home and used a gun to threaten

them. Id. Thus, the trial court did not improperly consider the distinguishing element of the offenses as an aggravating circumstance when sentencing McKinney.

As to McKinney's character, the presentence investigation report (PSI) reveals that McKinney, who was twenty-two years old at the time of sentencing, has one prior criminal conviction—specifically, McKinney was convicted of criminal conversion in April 2003. Id. at 18. The PSI also indicates that McKinney admitted that he has smoked marijuana daily since he was eleven years old and drank alcohol daily since he was eighteen years old. Id. at 20.

McKinney contends that we should assign mitigating significance to the fact that he pleaded guilty and to his "minimal" criminal record. Appellant's Br. p. 7. First, a guilty plea does not automatically amount to a significant mitigating factor. Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999). "[A] guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one." Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. Here, McKinney received a substantial benefit for his guilty plea in light of the State's dismissal of a class B felony charge and the reduction of the class A felony burglary charge to a class B felony. Thus, McKinney's potential prison time was substantially reduced by his entry of a guilty plea.

In addition, the trial court did not err when it did not assign mitigating weight to McKinney's limited criminal history. The weight assigned to a mitigator is at the trial judge's discretion, and the judge is under no obligation to assign the same weight to a

mitigating circumstance as the defendant. Covington v. State, 842 N.E.2d 345, 348 (Ind. 2006). Here, the trial court stated that McKinney's criminal history was neither an aggravator nor a mitigator. Sent. Tr. p. 12. Under these circumstances, we decline to consider his guilty plea or criminal history to weigh significantly in his favor as we examine his character.

Given the nature of the offense and McKinney's character, we conclude that the trial court's imposition of the ten-year advisory sentence for the commission of class B felony burglary is not inappropriate.

The judgment of the trial court is affirmed.

KIRSCH, C.J., and SHARPNACK, J., concur.